

develop a regulation banning religious, sexual orientation and/or gender identity discrimination with Federal or other public funds.

Response: Religious organizations and secular organizations alike must follow Federal civil rights laws prohibiting discrimination on the bases of race, color, national origin, gender, age, and disability. However, the Federal civil rights laws are silent on discrimination on the basis of sexual orientation and/or gender identity, and we decline to impose such restrictions by regulation.

Comment: Several commenters noted that if religious organizations are providing program services and facilities, then they must be in compliance with the Americans with Disabilities Act (ADA). Persons with disabilities should not be assigned to alternative or substitute programs or services.

Response: Although it is beyond the scope of these regulations to address how various civil rights laws might apply in all situations, organizations providing services must comply with Federal civil rights laws to the extent that those laws are applicable. In particular, we note that Title III (Public Accommodations and Services Operated by Private Entities), section 307 of the Americans with Disabilities Act of 1990 excludes religious organizations or entities controlled by religious organizations, including places of worship, from the provisions. Yet, religious institutions are subject to several requirements designed to ensure services to persons with handicaps in section 504 of the Rehabilitation Act of 1973, and its implementing regulations at 45 CFR part 84, which prohibit discrimination on the basis of disability in programs or activities receiving Federal financial assistance.

IX. Notice, Referral, and Provision of Services From Alternative Providers

Background

Section 260.34(f) of the proposed rule (now § 260.34(g)) received more comments than any other provision. In this section, we stated that individuals applying for or receiving Federal TANF or MOE-funded services may object to the religious character of a religious provider. If so, they are entitled to receive services from an alternative provider. The State or local agency must refer the individual to an alternative provider of services within a State-defined, reasonable period of time. Alternative providers must be reasonably accessible and be able to provide comparable services, which are at least equal in value to those the

individual would have received from the initial provider. The alternative provider does not have to be a secular organization, just one to which the program beneficiary has no religious objection. Since effective services need to take into consideration local conditions, we deferred to States on how to accomplish these statutory and regulatory objectives.

However, the proposed rule did clarify that State and local governments are responsible to ensure that clients are provided notice of their rights to alternative providers, and are referred to and provided alternative services within a reasonable period of time, if they object to a religious provider. And, while the responsibility for the notice, referral and provision of the alternative service rests with the State or local agency, each participating organization has a responsibility to help clients know and understand their rights. We also encouraged all involved organizations to develop and implement reasonable tracking procedures to ensure that clients do not “fall through the cracks” and lose timely services.

Comment: Several commenters noted that the requirement to provide alternative services places additional burdens on State agencies, especially in rural areas. A faith-based organization may be selected as the service provider for a particular geographic area. Ensuring that an alternative service provider is available could require the State to make dual sets of services available, and thus increase costs. As a result, many of these commenters suggested that the requirement to provide alternative services is unreasonable. Some suggested that exceptions be permitted or that the requirement should be eliminated. Others noted that with this requirement, some States may choose not to contract out or provide community-based services, especially in rural areas.

Response: In enacting the Charitable Choice provision, Congress had to carefully balance the rights of individuals with the duty of government to not discriminate with respect to religion when selecting non-governmental providers of social services. To accomplish these two principles, the statute imposes the requirement to provide accessible and comparable assistance or services within a reasonable period of time to an individual who has an objection to the religious character of an organization. In the proposed rule, with the exception of requiring notice and referral, we did not expand or enhance the rights of beneficiaries to assistance from an alternative provider, but simply

clarified this statutory entitlement. We also left substantial discretion to States to define terms and carry out the statutory objective.

We also believe that commenters may have overestimated the impact and potential burden of this requirement. Many faith-based organizations have a long history of contracting with State and local governments to address the secular purpose of providing assistance and services to needy families. Few beneficiaries have objected to the religious nature of these providers, which is perhaps unsurprising in light of the fact that any inherently religious activities must be offered separately and on a voluntary basis. We also do not believe States will decide not to contract out or provide community-based services in order to avoid this requirement. Since the statutory Charitable Choice requirements have applied since 1996, we believe that State and local governments are providing alternative services, in compliance with the law, and discovering and enhancing procedures that efficiently and effectively address this requirement.

It is also worth noting that one of the aims of Charitable Choice is that faith-based and community-based organizations will be able to expand their capacity to provide for the social service needs of under-served areas. Also, in soliciting competition for possible Federal TANF or State MOE funds, a State could, for example, include among the factors that it will weigh toward choosing a provider, the ability of potential providers to provide beneficiaries with transportation to and from the point of service.

Finally, the TANF Charitable Choice provisions leave it up to States to decide whether to involve the non-governmental social service sector or to provide all services through government agencies. In some areas, the latter may be the State's only choice, until non-governmental providers expand their service capabilities. But, if a State does choose to involve any non-governmental providers, then the Charitable Choice provision at section 104(c) of PRWORA as amended (42 U.S.C. 604a(c)) requires involving religious organizations on the same basis as any other non-governmental provider.

Comment: Several commenters believed that the proposed rule left too much discretion to States to define the terms “reasonably accessible,” “a reasonable period of time,” “comparable,” “capacity,” and “value that is not less than.” These commenters asked that we either provide Federal definitions for these terms, or establish